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OCA 88-1426

18 May 1988

The Honorable Dick Cheney  
Permanent Select Committee  
on Intelligence  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Cheney:

I read with great interest the paper you presented to the American Bar Association Standing Committee on Law and National Security, as reprinted in the Congressional Record and excerpted in the 3 May Wall Street Journal, concerning the Legislative and Executive roles in Covert Operations. I was especially interested in your analysis of the interplay between the constitutional power of the President and Congress in matters of foreign affairs, the practical and constitutional problems with any law requiring Congressional notification of all Presidential Findings within 48 hours without exception, and your suggested alternative approach to pending legislation mandating such notification.

As you know, I am in agreement with many of the points you make with respect to the proposed 48-hour notification requirement. I believe the Congress should seriously consider your proposed alternative approach that would retain the President's discretion to delay notification in rare cases.

As always, your views are widely read and respected by officers here at CIA. You have my compliments for a most thoughtful and useful analysis.

Sincerely yours,

William H. Webster  
Director of Central Intelligence

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CENTRAL INTELLIGENCE AGENCY



Director of Congressional Affairs

9 May 1988

NOTE FOR THE JUDGE:

I recommend you sign this letter to Dick Cheney praising his recent article on the 48-hour bill. Your response borders on the political, but you have already stated, publicly and formally, your similar views on this bill.

Cheney's "alternate framework" is detailed in the first column of the last page of the attached material from the Congressional Record.

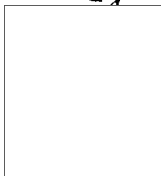
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John L. Helgerson

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Attachment



THE WALL STREET JOURNAL TUESDAY, MAY 3, 1988

# Covert Operations:

By DICK CHENEY

There is a consensus in Washington after Iran-Contra that the process for managing legislative-executive relations on covert operations could be improved. The consensus quickly breaks down, however, as people begin putting forward concrete suggestions.

A bill, already passed by the Senate and moving forward in the House, would require the president under all conditions, with no exceptions, to notify Congress of covert operations within 48 hours of their start. It is a typical example of "never again" thinking by Congress. To make sure the last disaster will never again repeat itself, Congress is willing to deprive future presidents of all possible discretion under conditions Congress cannot possibly foresee.

At the heart of the dispute over this bill is a deeper one over the scope of the president's inherent constitutional power. I believe the president has the authority, without statute, to use the resources placed at his disposal to protect American lives abroad and to serve other important foreign-policy objectives short of war.

Congress does have the power, however, to control the money and material resources available to the president for covert actions. Because Congress arguably cannot properly fulfill its legislative function on future money bills without information, some kind of a reporting requirement can be understood as a logical extension of a legitimate legislative power.

## Limiting the Money Power

The constitutional question is: What are the limits to what Congress may demand as an adjunct of its appropriations power? Broadly speaking, Congress may not use the money power to achieve purposes that it would be unconstitutional for it to achieve directly. It could not place a condition on the salaries of judges, for example, to prohibit the judges from spending any time to reach a particular constitutional conclusion. In the same way, Congress could not use its clearly constitutional powers over executive-branch resources and procedures to invade an inherently presidential power.

How does this reasoning apply to the proposed 48-hour rule? In 1980, Congress revised the intelligence oversight law to require the president to notify the House and Senate intelligence committees before beginning any significant, anticipated intelligence activity. It justified the requirement on its need for information to fulfill its legislative power to appropriate money.

There is a line of Supreme Court decisions dating from 1821, up to 1926, which

implied power to demand information. But what happens if the power to demand information confronts another implied power held by another branch that is equally well grounded on a constitutional foundation? That was the issue in the executive-privilege case of *U.S. v. Nixon*. In that case, we learned that the decision in any particular case must rest on the competing claims of the two branches at odds with each other. That is how I think the 48-hour rule must be considered.

The 48-hour bill recognizes the president's inherent power to initiate a covert action—as long as that action is limited to resources already available to the president. If Congress ever tries to insist on advance approval, that would surely be overturned as a legislative veto.

But if the president has the inherent power to initiate covert actions, then the

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## *The Carter administration gross for about three months smuggled out of the Canadian*

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same rule that gives Congress the implied power to demand information also gives the president the implied powers he may need to put his acknowledged power into effect. In virtually all cases there is no conflict between the president's power to initiate an action and requiring the president to notify the intelligence committees (or a smaller group of leaders) of that operation in advance. In a few very rare circumstances, however, there can be a direct conflict.

One good example was the Carter administration's decisions to withhold notification of some Iran hostage rescue operations. In one case, notification was withheld for about three months until six Americans could be smuggled out of the Canadian Embassy in Tehran. In fact, Canada made withholding notification a condition of its participation.

The Iranian hostage examples show that when notification has to be withheld may depend not on how much time has elapsed, but on the character of the operation. There is no question that when other governments place specific security requirements on cooperating with the U.S., the no-exceptions aspect of the 48-hour rule would be equivalent to denying the president his inherent power to act.

What is the constitutional justification for the proposed bill? The best argument, to quote the Senate Intelligence Committee, is that notification is needed "to give Congress a chance to exercise its oversight responsibilities."

# Who's in Charge?

tion." The problem is that there is no legislative power that requires notification under all conditions during any precisely specified time period. All Congress needs to know is whether to continue funding on-going operations.

Who should have the power to decide that notification would make action impossible? In the rare situation in which a president believes he must delay notification as a necessary adjunct to fulfilling his constitutional mandate, that decision must rest with the president. The president obviously cannot consult with Congress about whether to consult.

You could argue that failure to notify might, in the extreme, deprive Congress of this power. Iran-Contra was such an extreme. But the price of assuring notification within a specific time period is to make some potentially life-saving opera-

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*on withheld notifying Congress until six Americans could be rescued from Embassy in Tehran.*

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tions impossible. On the scale of risks, there is more reason to be concerned about depriving the president of his ability to act than about Congress's alleged inability to respond. Congress eventually will find out about decisions of any consequence. When that happens, it has the political tools to take retribution. President Reagan learned this dramatically. It is a lesson no future president is likely to forget.

The current approach certainly does have some problems. We have seen that it too often breeds frustration and mistrust in both the legislative and executive branches. This is not a one-sided problem. Congress had every reason to be angry about the way the National Security Council staff deceived us about the Contra resupply effort. But the president has just as much cause to be angry about the way the speaker and the Rules Committee use their scheduling power to delay, prevent or structure floor votes, about the way members can unilaterally decide that a previously covert operation is ripe for public debate, and about the incessant problem of leaks. Each side has good reason to think the other has contributed to a breakdown of comity.

What we need is a modified set of procedures that will permit each side to recognize the other's appropriate constitutional role. In this spirit, I offer the following as a framework for reforming the Intelligence Oversight Act.

1. The president shall retain the constitutional power to conduct operations

even if some members of Congress consider the operation controversial.

2) Requiring notification within 48 hours can be accepted in general, but only if there is an escape clause for the president to invoke unilaterally in exceptional circumstances.

Congress also needs to take steps to improve its own ability to protect secrets. Current procedures almost require an operation's cover to be blown before the operation can be discussed outside of committee. If Congress had adequate security laws and procedures, with stiff penalties for violations, the end result probably would be more frank discussion, not less.

As long as Congress is considering disclosure, let me make one more modest proposal. The U.S. needs only one secretary of state. No member of Congress ever should take it upon himself to negotiate with a foreign government. Fact finding is an acceptable part of a legislator's job. Negotiating is not. All discussions that even might turn into negotiation, therefore, ought to be held only within a context of regular State Department communication and guidance.

## A 48-Hour Rule for Congress

To help restore a proper respect for the separation of powers, it might be a good idea to apply something like the 48-hour rule in reverse. Members of Congress should be required to submit written reports to the State Department describing any communications they have with a foreign government within 48 hours after they occur.

Whether or not this proposal is accepted by Congress, it points to an important underlying issue. Legislative-executive relations did break down during the Iran-Contra affair. Congress made the president pay a stiff price for that breakdown, and the president has taken several important steps to improve procedures on his end of Pennsylvania Avenue. But the real problems are two-way. We in Congress ought to look at what we can do to improve our own behavior.

The 48-hour bill would "get back" at President Reagan by tying the hands of all future presidents. That approach will achieve nothing useful. The better way is with procedures that encourage each branch to respect the other's proper role. Comity comes through hard work on a daily basis. But the first step must be mutual respect.

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*Rep. Cheney (R., Wyo.) is a member of the House Intelligence Committee and was the ranking minority member of the House Committee to Investigate Certain Arms Transactions with Iran.*

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## ROUTING AND RECORD SHEET

SUBJECT (Optional)

Thank You Letter to Representative Dick Cheney

FROM:

John L. Helgerson  
Director of Congressional

NO.

OCA 88-1426

DATE

09 MAY 1988

TO: (Officer designation, room number, and building)

DATE

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

RECEIVED

FORWARDED

09 MAY 1988

10 MAY 1988

1. Executive Director

2.

3. Deputy Director of  
Central Intelligence

4.

5. Director of Central  
Intelligence

6.

7. Return to Director of  
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Director of Congressional Affairs

9 May 1988

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